**UNITED STATES OF AMERICA**
**BEFORE THE**
**DEPARTMENT OF COMMERCE**

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| **Broadwater Energy LLC** | ) | |
| **Broadwater Pipeline LLC** | ) | |
| **Appellants,** | ) | **Case No. _____** |
| | ) | |
| **vs.** | ) | |
| | ) | |
| **New York State** | ) | |
| **Department of State** | ) | |
| **Respondent.** | ) | |

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**RESPONSE OF BROADWATER ENERGY LLC AND BROADWATER PIPELINE LLC OPPOSING THE ATTORNEY GENERAL OF CONNECTICUT'S MOTION FOR LEAVE TO FILE A BRIEF IN SUPPORT OF RESPONDENT**

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## INTRODUCTION

Broadwater Energy LLC and Broadwater Pipeline LLC (collectively, "Broadwater") filed its Notice of Appeal in the referenced proceeding on June 6, 2008 pursuant to § 307(c)(3)(A) of the Coastal Zone Management Act ("CMZA"), 16 U.S.C. § 1456(c)(3)(A) and 15 C.F.R. Part 930, Subpart H. Broadwater submitted its Initial Brief on Appeal on July 7, 2008. On June 20, 2008, the Secretary directed the New York State Department of State ("NYSDOS") to file its principal brief by no later than August 6, 2008. Following a nine-day extension, the NYSDOS filed its principal brief on August 15, 2008. The Attorney General of Connecticut ("CTAG") filed a motion for leave to file an *amicus* brief (the "Motion for Leave") in support of the NYSDOS's objection to Broadwater's proposed liquefied natural gas terminal in the New York State waters of Long Island Sound (the "Project") on August 15, 2008, in apparent concert with the NYSDOS's filing. For the reasons stated below, Broadwater respectfully submits that the Secretary must deny the CTAG's Motion for Leave.

## ARGUMENT

### I. NOAA'S COASTAL ZONE MANAGEMENT ACT REGULATIONS COMPEL DENIAL OF THE INCLUSION OF THE CTAG'S *AMICUS* BRIEF IN THE DECISION RECORD FOR THE PROJECT

The National Oceanic and Atmospheric Administration's ("NOAA") regulations governing appeals to the Secretary, 15 C.F.R. Part 930, Subpart H, compel denial of the inclusion of the Motion for Leave and the corresponding *amicus* brief in the decision record for Broadwater's appeal.

NOAA's January 5, 2006 revisions to its CZMA regulations preclude the Secretary from allowing public comment on appeals involving energy projects such as Broadwater's Project. 71 Fed. Reg. 788, 800 (Jan. 5, 2008). Specifically, NOAA stated that its regulations do "not provide a public or Federal agency comment period for appeals of energy projects. Supplemental public or Federal agency comment during the Secretary's review of an appeal for an energy project may only be provided if the Secretary determines such opportunity for comment is needed pursuant to [15 C.F.R. § 930.130(a)(2)]." Id. 15 C.F.R. § 930.130(a)(2) allows the Secretary to accept information into the decision record during a consistency appeal only under the following limited circumstances: (1) *a party* to the proceeding submits information to clarify information already present in the decision record; or (2) the Secretary determines that additional information is needed to complete the consistency review and specifically requests the information. 15 C.F.R. § 930.130(a)(2)(ii) [emphasis supplied]. Neither circumstance is present here.

There are two parties in CZMA appeals involving energy projects, the objecting state and the project proponent. See 15 C.F.R. Part 930, Subpart H. The CTAG has not sought "party" status in this proceeding nor could the Secretary grant the CTAG such status.

Nor is Broadwater aware of any conclusion by the Secretary that he needs

information from the CTAG to complete his consistency review or a specific request from the Secretary that the CTAG provide the information.

Accordingly, the plain language of the NOAA regulations compels denial of CTAG's motion.

A. The Administrative Procedures Act Does Not Provide For the *Amicus Curiae* Participation of the CTAG Under the Circumstances of this Proceeding

The application of section 555(b) of the Administrative Procedures Act ("APA"), the Energy Policy Act of 2005 and NOAA's regulations do not provide the CTAG the right to unilateral participation in this proceeding. As discussed below, the Energy Policy Act of 2005 and NOAA's regulations inform application of the general language of § 555 in this appeal.

Generally, under § 555(b), the right to appear before an administrative agency is not "blindly absolute, without regard to . . . status of proceedings [or] administrative avenues established by other statutes and agency rules for participation." Colorado River Water Conservation Dist. v. United States, 593 F.2d 907, 911 (10th Cir. 1977). Specifically, a third party's ability to participate in a specific agency's proceedings can be, and is, limited under statutes and regulations specific to those agencies. For example, the rules of the Nuclear Regulatory Commission do not generally permit briefs of *amicus curiae* supporting or opposing petitions for review. See In the Matter of Louisiana Energy Servs., 45 N.R.C. 437 (1997) (citing 10 C.F.R. § 2.715(d) and denying motion for leave to file an *amicus curiae* brief); see also Herzig v. British Am. Commodity Options, CFTC Docket No. R 77-116, 1979 WL 11508 (C.F.T.C. 1979) (noting the agency's restriction on *amicus curiae* participation to situations where a party's participation was expected to be of substantial assistance to the hearing officer).

With regard to the current proceeding, the applicable statutes and regulations, *i.e.*, the Energy Policy Act of 2005 and the implementing regulations adopted by NOAA and the

Federal Energy Regulatory Commission ("FERC"), were passed and promulgated after § 555(b). When statutes passed subsequent to the APA contain "sole and exclusive" procedures for administrative proceedings, the APA, including § 555(b), is thereby displaced. Castillo-Villagra v. Immigration & Naturalization Serv., 972 F.2d 1017, 1025 (9th Cir. 1992). The Energy Policy Act of 2005 not only provides the "exclusive authority" for approving or denying applications for the "siting, construction, expansion, or operation of an LNG terminal," but further provides, along with regulations promulgated under Section 3 of the Natural Gas Act, 15 U.S.C. 717b(e) and NOAA's CZMA regulations adopted in response, a comprehensive set of requirements and procedures for proceedings thereunder.[1]

Thus, despite the general language and application of § 555(b), under the sole and exclusive procedures discussed herein, there is no authority to permit the CTAG to unilaterally submit public comment in any form, including an *amicus curiae* appearance, during the appeal. Therefore, Energy Policy Act of 2005 and NOAA's regulations applicable to the Secretary on this appeal inform the general application of § 555(b) in this context and prohibit the participation the CTAG now seeks.

B. Granting *Amicus Curiae* Status to the CTAG is Not Warranted under § 555(b)

Even if the Secretary concludes that he has discretion to permit an *amicus curiae* filing under § 555(b) of the APA, he should not grant CTAG's *amicus curiae* appearance in Broadwater's consistency appeal as it would disrupt the "orderly conduct of public business" in the appeal. 5 U.S.C. § 555(b). Such limitation compels denial of requests for leave to intervene or otherwise participate in agency proceedings "when, for example, other parties to the

[1] Moreover, other provisions/requirements of the APA have been held not to apply to proceedings under § 3 of Natural Gas Act, even before the Energy Policy Act of 2005. See, e.g., Panhandle Producers & Royalty Owners Assoc. v. Econ. Regulatory Admin., 847 F.2d 1168, 1178 (5th Cir. 1988) ("the fact that hearings have been required in other cases involving the Natural Gas Act does not mean that a hearing is required for every order decided under section 3") (internal citations omitted).

proceeding adequately represent the would-be intervenor's viewpoint or intervention would broaden unduly the issues considered, obstruct or overburden the proceedings, or fail to assist the agency's decision making." Nichols v. Bd. of Trustees of the Asbestos Workers Local 24 Pension Plan, 835 F.2d 881, 897 (D.C. Cir. 1987). Any attempt by the CTAG to participate as *amicus curiae* in the present consistency appeal must be denied under the foregoing standard.

*i. The CTAG's Request is Distinguishable from Prior NOAA Decisions Allowing Amicus Participation*

Although the Secretary recently granted *amicus* status to the City of Fall River (the host municipality) in Weaver's Cove Energy, LLC and Mill River Pipeline, LLC (the "Weaver's Cove Appeal") there are several key distinctions between the State of Connecticut and the City of Fall River that compel the Secretary to deny the CTAG's Motion for Leave. The Weaver's Cove Project was located within the heart of the City of Fall River. The potential effects of the Weaver's Cove Project on the City of Fall River were direct and, in some cases, significant. See Decision and Findings by the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver's Cove Energy, LLC and Mill River Pipeline, LLC from an Objection from the Commonwealth of Massachusetts, at 23 (June 26, 2008). In stark contrast, the components which make up Broadwater's Project, including the pipeline, pipeline mooring tower and the floating storage and regasification unit ("FSRU") are not located within Connecticut's waters. The FSRU has been properly sited so that it will be 10.2 miles away from the nearest Connecticut shoreline. Coast Guard's Waterway Suitability Report ("WSR") § 8.2. (BW 7749 - 7750). In addition, the Coast Guard's initial proposed recommended safety and security zones around the FSRU would cover only 0.11% of the approximately 1,320 square miles of total navigable water in Long Island Sound and only a very tiny fraction of that 0.11% area would be located in Connecticut. Id.; Broadwater's Initial Brief at 29 – 30. The liquefied

natural gas carriers will not transit through Connecticut waters based upon the route selected by the Coast Guard. Coast Guard WSR at § 2.1 (BW 7605 - 7606); Final Environmental Impact Statement, § 3.7.1.4 (BW 29042 - 29058). While the safety and security zones recommended by the Coast Guard will extend partially into Connecticut waters, the coastal effects of these zones are minor as they would not affect a particular location in Long Island Sound for more than fifteen minutes during carrier transits two to three times per week. Coast Guard WSR § 3.1.2.3 (BW 7640 - 7642); see also Broadwater's Initial Brief at 29 – 32. The visual effects of the Project on the State of Connecticut also will be minor. FEIS, § 5.1.5 (BW 29236-29240); see also Broadwater's Initial Brief at 13 – 18.

The City of Fall River defended against the elimination of the public comment for energy projects by NOAA's January 5, 2006 revisions to its CZMA regulations by asserting that the FERC record for the Weaver's Cove project was closed prior to the enactment of the Energy Policy Act of 2005. Weaver's Cove Appeal, http://www.ogc.doc.gov/czma.htm, Reply in Further Support of the Motion of the City of Fall River for Leave to File a Single Amicus Curiae Brief in Support of Respondent, at 3. In contrast, the Energy Policy Act of 2005 was enacted long before the FERC record was closed for the Broadwater Project.

And, of course, Fall River is a local municipality while Connecticut is a state. Broadwater is unaware of the Secretary granting a state *amicus curiae* status after the January 5, 2006 revisions to the CZMA regulations.

*ii. The State of Connecticut Waived Several Opportunities To Review the Project for Consistency with its Coastal Management Plan*

In addition, the CZMA and NOAA's implementing regulations provided the State of Connecticut a right to review the coastal effects of the Project for consistency with the State's coastal management policies. The State of Connecticut waived its opportunity to review any

coastal effects associated with the federal permit/licenses to be issued for Broadwater's Project under Subparts D and I of NOAA's CZMA regulations. With respect to the State's potential CZMA review of any "interstate" coastal effects related to the Project, Connecticut failed to obtain the necessary NOAA approval of its interstate coastal effects list prior to Broadwater's submission of applications to the federal agencies with permitting authority over the Project as required by Subpart I. 15 C.F.R. § 930.154(e). In addition, if it is assumed that the Letter of Recommendation ("LOR") issued by the Coast Guard is a federal permit/license under NOAA's regulations,[2] Connecticut failed to provide notice to the Coast Guard, NOAA and Broadwater of the State's intent to review the LOR or obtain the required NOAA approval to review the LOR. See 15 C.F.R. § 930.54. Such failure to notify resulted in a waiver of the State's right to review the LOR for consistency with its coastal management plan. Id.; Memorandum from T. Hayes COMDT (G-LEL) to CAPT Kenney CGD one (d) (December 1, 2005 (BW 17589 - 17593).

Host municipalities, such as the City of Fall River, do not have review rights under the CZMA and NOAA's implementing regulations and, therefore, the only resource in a consistency appeal for them, in most instances, is *amicus curiae* participation. As a result, the equitable considerations that played a role in the Secretary's prior decisions allowing *amicus curiae* appearances by host cities and municipalities are absent from the CTAG's Motion for Leave.

*iii. The CTAG's Amicus Brief Raises Issues that Are Unrelated to the Present Appeal, Outside the Realm of His Expertise, and Addressed in the Public Record*

In his Motion for Leave and the accompanying brief, the CTAG seeks to have the Secretary consider the effects of the Project on Connecticut's coastal zone. The Secretary must

[2] As noted in Broadwater's prior pleadings in this appeal, the U.S. Coast Guard issued its LOR for Broadwater's Project on June 25, 2008.

reject the CTAG's attempt to circumvent the CZMA and NOAA's regulations by suggesting that the Secretary must consider the effects of the Project on Connecticut's coastal zone when the present appeal involves the Project's alleged effects on New York State's coastal zone. This is an appeal of NYSDOS's objection to the consistency of the Broadwater Project with the Long Island Sound Coastal Management Program ("LISCMP"), which is applicable only to the coastal zone in New York State. Any alleged coastal effects of the Project on Connecticut's coastal zone are not within the scope of Broadwater's appeal and must be disregarded by the Secretary. The CTAG also seeks to raise issues related to the safety and security zones to be established by the Coast Guard. The Coast Guard has not yet commenced the rulemaking process to adopt the safety and security zones for the Project nor has it initiated the CZMA process applicable to the review of the coastal effects attributable to these zones (15 C.F.R. Part 930, Subpart C).

In addition, the State of Connecticut's interests in this proceeding are adequately represented by New York State (through the NYSDOS). "When a court determines the parties are already adequately represented and participation of a potential *amicus curiae* is unnecessary because it will not further aid in consideration of the relevant issues, leave to appear has been denied." Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 27 F.R.D. 65, 82 (D.N.J 1993). The Motion for Leave states that the "Attorney General's brief addresses numerous issues of direct relevance to the State of Connecticut that no other party is positioned to raise and will assist the Secretary in his deliberations on this matter." Motion for Leave at ¶ 4. Aside from the alleged coastal effects of the Project on Connecticut's coastal zone (which are not the subject of this appeal), a close examination of the CTAG's *amicus curiae* brief compels a different conclusion. The *amicus curiae* brief includes a general overview of the standards governing the Secretary's review of Broadwater's consistency appeal and then proceeds to evaluate the Project

for consistency against *New York State's* LISCMP. Broadwater is not aware of any specific authority granted to, or expertise possessed by, the CTAG in the interpretation and application of New York State coastal management policies. And there are no arguments relevant to the application of New York State's coastal management policies that cannot be, and have not been, raised and advocated by the NYSDOS.

Connecticut's appearance as *amicus curiae* also would be redundant and fail to assist the Secretary's decision making. As noted in the Motion for Leave, the CTAG "has been significantly involved before the [FERC] and the New York Department of State throughout the pendency of this matter [and] [t]he Attorney General has filed numerous briefs and comments on behalf of the State of Connecticut and has personally appeared at several public hearings." Motion for Leave at ¶ 3. Even a cursory review of the CTAG's *amicus curiae* brief compels the conclusion that many of the arguments being made by the CTAG are the same as those that the CTAG and other representatives of the State of Connecticut have raised in the proceedings before the FERC and, therefore, are already part of the decision record for this consistency appeal.

*iv. The Motion for Leave is Untimely and Negatively Impacts The Timing of the Appeal Proceedings*

The motion should also be denied because it is late and could jeopardize the Secretary's ability to timely issue a decision on the appeal of Broadwater. NOAA's CZMA regulations establish strict procedures that the parties to a consistency appeal must follow to ensure that the appeal process is completed and the Secretary renders a final decision in accordance with the timeframe established in the Energy Policy Act of 2005. 78 Fed. Reg. at 800. The parties to the proceeding cannot deviate from these timeframes absent a showing of good cause and an extension from the Secretary. Granting the Motion for Leave would allow the

CTAG to undermine the expedited appeals process required by the Energy Policy Act of 2005 and NOAA's January 5, 2006 revisions to its CZMA regulations.

Broadwater's notice of appeal was filed on June 7, 2008. Public notice of this appeal was published in the Federal Register on July 7, 2008 and Broadwater filed its principal brief with the Secretary on that same day. Although the present appeal involves an energy project for which NOAA's regulations specify no public comment period, if a public comment period were provided in the context of an energy facility appeal, then, under NOAA's regulations, in order to be considered by the Secretary, the CTAG's comments would have been required to be submitted within 30 days of publication of the notice of appeal in the Federal Register. 15 C.F.R. § 930.128(a). The CTAG's Motion for Leave was filed well after this 30 day deadline. It also was filed after the deadline established in NOAA's regulations for principal briefs (i.e., 60-days from the filing of the notice of appeal). 15 C.F.R. § 9301.127(a). The CTAG neither requested nor received the Secretary's approval to file its Motion for Leave after the specified regulatory deadline for the filing of principal briefs.

*v. The CTAG's Amicus Curiae Appearance is Prohibited Because it is an Advocate for the NYSDOS's Position*

"Where a petitioner's attitude toward a litigation is patently partisan, he should not be allowed to appear as *amicus curiae*." Yip v. Pagano, 606 F.Supp.1566, 1568 (D.N.J. 1985); see also United States v. Gotti, 755 F.Supp. 1157, 1159 (E.D.N.Y 1991) (rejecting *amicus curiae* application for its failure to provide an "objective, dispassionate, neutral discussion of the issues"). The CTAG's unduly strenuous, hyperbolic, emotional opposition to Broadwater's Project is indisputable from the decision record for this appeal. See, e.g., Comments of the Connecticut Attorney General on the Draft Environmental Impact Statement (January 23, 2007) (BW 12825-12895) ("I oppose the Broadwater project because it is an unacceptable security

danger, environmental atrocity, and an aesthetic monstrosity."); Supplemental Comments of the Connecticut Attorney General on the Draft Environmental Impact Statement (March 8, 2007) ("The DEIS for this illegal and dangerous project fails to provide a complete environmental impacts and alternative analysis and is therefore in violation of [NEPA]") (BW 16552-16572). The *amicus curiae* brief sought to be introduced through the Motion for Leave stridently advocates the position of the NYSDOS and refers to Broadwater's Project as "ill-conceived, poorly sited, and inadequately studied." Connecticut Attorney General's Amicus Brief at 2. (August 15, 2008). This type of advocacy is not the objective and dispassionate discussion necessary to satisfy the *amicus curiae* standard. Rather, it is the type of public comment on appeal of an energy project such as the Broadwater Project that is expressly prohibited by the applicable regulations. 71 Fed. Reg. 788, 800 (January 5, 2008) (citing 15 C.F.R. § 930.130(a)(2).

## II. BROADWATER'S REQUEST, IN THE ALTERNATIVE, FOR ADDITIONAL BRIEFING AND CONCLUSION

For the foregoing reasons, the Motion for Leave must be denied. However, if the Secretary elects to grant the Motion for Leave, Broadwater respectfully requests that the Secretary issue a scheduling order to allow Broadwater the opportunity to submit a reply brief pursuant to 15 C.F.R. § 930.127(e). As the *amicus* brief filed by the CTAG exceeds the 30-page limit established for principal briefs in 15 C.F.R. § 930.127(b) (and the CTAG failed to seek the Secretary's approval to exceed the regulatory page limit), Broadwater respectfully requests permission to submit a reply brief not to exceed 25 double spaced pages within **30** days of the Secretary's decision on the Motion for Leave. Respectfully, permitting such reply briefing is necessary to correct the decision record, preserve Broadwater's rights and is consistent with fundamental principles of fairness.

Dated: August 25, 2008

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response of Broadwater Energy LLC and Broadwater Pipeline LLC to the Attorney General of Connecticut's Motion for Leave to File Brief in support of Respondent was served this 25th day of August 2008, by first-class mail unless otherwise indicated, on the following persons at the addresses listed below.

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